Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio	)	CS Docket No. 00-253
In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Wickliffe, Ohio	)	CS Docket No. 00-254
In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Pepper Pike, Ohio	)	CS Docket No. 00-255

REPLY COMMENTS OF CONCERNED MUNICIPALITIES

National: National Association of Counties, National League of Cities

AL: City of Auburn

AZ: City of Mesa

CA: City of Cerritos, City of Concord, Imperial County

CO: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of most municipalities in the greater Denver area.

FL: City of Coral Gables, City of Tallahassee

IL: City of Chicago, City of Batavia, Village of Lisle, City of Marshall

MI: City of Detroit, Ada Township, Alpine Township, City of Belding, City of Cadillac, Coldwater Township, City of Coopersville, City of East Lansing, Genesee Charter Township, Grand Rapids Charter Township, Holland Charter Township, City of Kalamazoo, City of Kentwood, Laketown Township, City of Livonia, City of Marquette, City of Monroe, City of Plainwell, City of Portland, PROTEC (Michigan Coalition to Protect Rights of Way), City of Southfield, Tallmadge Charter Township, City of Walker, City of Whitehall, City of Wyoming, Zeeland Charter Township

MO: City of St. Joseph

NM: City of Sante Fe, Town of Taos

NV: City of Henderson, City of Winnemucca

OH: City of Cincinnati, City of Dublin, Ohio Municipal League

TX: City of Houston, City of Fort Worth, Town of Addison, City of Carrollton, City of Grand Prairie, City of Huntsville, City of McAllen, City of Paris, City of Plano, City of Victoria and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues)

WA: City of Bellingham

WI: City of Waukesha

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SUMMARY

These Reply Comments are submitted by Concerned Municipalities representing directly or indirectly literally almost every city and county in the U.S., with a population of approximately 260 million people located in all fifty states.

The three Petitions in this matter deal with specific situations in three cities in Ohio. However, the providers' comments provide no information on matters in these three cities. Instead, the providers' comments attempt to convert this case into a notice of proposed rulemaking on right of way matters and turn this Commission into a Federal Franchising Authority and Federal Right of Way Management Authority for highways nationwide. Congress did not grant this authority to the Commission (see below). The providers' comments should have been filed in this Commission's 1999 Notice of Inquiry on Right of Way Management matters.

Relatedly, this Commission and the courts have said repeatedly that the proper way to proceed under Section 253 is first to determine whether there is a "prohibition or effective prohibition" on entry under Section 253(a). Then, and only then, does the analysis proceed to whether the matter is protected by Section 253(b) or (c). The providers improperly ignore this consistent (and correct) construction of Section 253 in their effort to turn the Commission into a Federal Right of Way Management Authority.

Because the provider comments did not relate in any way to City Signal or the three communities in Ohio (but instead described their claimed experiences elsewhere), they do not support the essential predicate for Section 253, namely that there has been a prohibition or effective prohibition on entry in *this* case. Thus, the key requirement for application of Section 253 has not been met or advanced by the providers' comments.

The three instant disputes involve where a line is to be placed in the right of way, and thus indisputably relate to right of way management matters. They thus fall within Section 253(c) of the Act where Congress has expressly denied this Commission jurisdiction (and instead has left matters to the Federal District Courts). The providers impermissibly attempt to convert a right of way management matter under Section 253(c) into a claimed "delay" in issuing approval under Section 253(b) so as to bring these cases within the Commission's jurisdiction. This is not allowed.

Concerned Municipalities call this the "truculent two-year old" approach where the providers believe that if they say "no" to any city right of way management or compensation requirement long enough, they can create a delay, which (they claim) then gives this Commission jurisdiction under Section 253(b). Thus, the providers attempt to read Section 253(c) out of the Act and subvert the congressional intent, which was crystal clear – this Commission is denied jurisdiction over right of way management and compensation matters. The providers cannot create Commission jurisdiction simply by refusing to agree to right of way management or compensation matters.

For the Commission's information, Concerned Municipalities show that any claimed "delay" problems are minuscule (for example, compared to over 30,000 municipalities nationwide) and that many claimed delays are self inflicted or caused by provider incompetence. This includes providers providing incomplete information, applying for permits for streets that are not even located within the municipality in question (!) and knowing little and caring less about local and state law application requirements.

The (erroneous) information provided by the various providers on the claimed cost of undergrounding is not relevant to these matters which involve the specific costs City Signal would incur for the five specified locations in Cleveland Heights and similar locations in Wickcliffe and Pepper Pike. It is the cost of undergrounding in these specific situations, not generalized (but incorrect) statements of cost, that are at issue in this matter.

Concerned Municipalities would point out that the providers' claimed cost information is misleading. For example, their figures grossly understate the cost of aerial construction (often in the range of $20,000 to $30,000 per mile); ignore the fact that undergrounding costs can be as low as in the mid to low $20,000 per mile (such as by using various low cost alternatives, e.g., fiber lines and sewers, or plowing lines underground). Industry commentators also focus on only the initial cost of line installation and ignore "life cycle" costs where underground lines have an advantage because underground lines are not as subject to maintenance and replacement costs due to the ravages of weather, winter storms, lightning, falling trees, over height trucks, fires and automobiles bringing down utility poles as aerial lines. Finally, the providers' comparison of the cost of installation of the incumbent's aerial copper lines versus the provider's underground fiber lines is ludicrous because it fails to take into account the vast different in bandwidth or carrying capacity between the two. If cost without performance was the relevant criteria, airplanes would still be fabric covered biplanes and we would still be driving Model T's.

On the cost issue, City Signal's lines extend throughout a large area (according to its Comments, all of Northeast Ohio, which extends at least a hundred miles north to south and a hundred miles east to west). It is a certainty that City Signal has agreed to place its lines underground at various places in this large area. To the extent it has done so it has demonstrated that the costs of undergrounding are not prohibitive. In this regard, the Federal courts have recently rejected several recent Section 253 claims by providers expressly due to evidence that the provider, in fact, had agreed to the restriction it later decided to challenge. These cases show that it is desirable, if not necessary, to have a contested case hearing to investigate City Signal's undergrounding agreements elsewhere because they will likely show that the claimed "cost prohibition" does not exist.

Finally, requiring new and rebuilt utility lines to be placed underground is competitively neutral, nondiscriminatory and promotes the public safety and welfare. Most downtown areas and commercial areas

have utility lines underground specifically to protect the public safety and welfare from the hazard caused by falling poles and wires – the more lines on the poles the lower they are on the pole and the greater the risk they will sag and be snapped by a passing truck propping the poles and live wires into the streets. This is a basic reason lines are placed underground.

"Progressive undergrounding" (requiring new and rebuilt lines to go underground) is an appropriate municipal response to the problems caused by aerial lines – it costs less only to underground lines as they are rebuilt or replaced (rather than requiring lines to be placed underground today and later incur the additional expense of replacing them). Progressive undergrounding lets market forces operate so that the lines that get placed underground first are those that have the highest return (e.g., reach the most customers) or are least expensive to place underground. Progressive undergrounding defers the expense of undergrounding and spreads it over many years, thus conserving telecommunications provider funds. At the same time progressive undergrounding prevents the construction of additional aerial lines that would only make the problem worse.

Even a progressive undergrounding policy will generally affect an incumbent provider more than new providers because the incumbent not only has to replace old or deteriorated lines but (as the providers admit in their comments) the incumbents are engaged in a massive upgrade of their facilities to compete with the new providers.

The new providers, in fact, are seeking a competitive advantage by having this Commission adopt a federal policy requiring all utility lines to be placed underground at the same time, thus forcing the incumbents to encourage large costs.

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REPLY COMMENTS OF CONCERNED MUNICIPALITIES

I. INTRODUCTION

Concerned Municipalities ("Concerned Municipalities")[1], by their attorneys, hereby file

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[1]Concerned Municipalities consist of the following municipalities and municipal organizations:

National: National Association of Counties, National League of Cities
Alabama: City of Auburn
Arizona: City of Mesa
California: City of Cerritos, City of Concord, Imperial County
Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, Arapahoe County, City of Arvada, City of Aurora, City of Brighton, City of Broomfield, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, City and County of Denver, Douglas County, City of Edgewater, City of Englewood, Town of Erie, City of Glendale, City of Golden, City of Greenwood Village, City of Idaho Springs, Jefferson County, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, Town of Parker, City of Sheridan, City of Thornton, City of Westminster, City of Wheat Ridge
Florida: City of Coral Gables, City of Tallahassee
Illinois: City of Chicago, City of Batavia, Village of Lisle, City of Marshall
Michigan: City of Detroit, Ada Township, Alpine Township, City of Belding, City of Cadillac, Coldwater Township, City of Coopersville, City of East Lansing, Genesee Charter Township, Grand Rapids Charter Township, Holland Charter Township, City of Kalamazoo, City of Kentwood, Laketown Township, City of Livonia, City of

reply comments in the three above-captioned proceedings. Concerned Municipalities represent, directly or indirectly, almost every city and county in the U.S., and thus a population of approximately 260 million people located in all fifty states. This broad range of municipalities is filing these reply comments due to the importance of several major issues.

- The Congressional denial of Commission jurisdiction over right of way management issues and to reject the providers' attempt to turn this Commission into a Federal Franchising Authority and Federal Right of Way Management Authority for all state and local highways nationwide.
- The improper attempt by the providers to go far beyond the limited facts of these three cases and duplicate and repeat the Commission's recent Notice of Inquiry on right of way management matters.

	Marquette, City of Monroe, City of Plainwell, City of Portland, PROTEC (Michigan Coalition to Protect Rights of Way), City of Southfield, Tallmadge Charter Township, City of Walker, City of Whitehall, City of Wyoming, Zeeland Charter Township
Missouri:	City of St. Joseph
New Mexico:	City of Sante Fe, Town of Taos
Nevada:	City of Henderson, City of Winnemucca
Ohio:	City of Cincinnati, City of Dublin and Ohio Municipal League which is a voluntary association which represents the interests of its membership of more than 600 cities and villages in the State of Ohio
Texas:	City of Houston, City of Fort Worth, Town of Addison, City of Carrollton, City of Grand Prairie, City of Huntsville, City of McAllen, City of Paris, City of Plano, City of Victoria and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues consisting of approximately 90 Texas municipalities)
Washington:	City of Bellingham
Wisconsin:	City of Waukesha

- To correct misleading information from providers that undergrounding is much more expensive than aerial construction.
- The purported delay objected to by City Signal is a non-issue (created by the providers in an improper attempt to confer jurisdiction on the Commission), with the real issue being the undergrounding issue.
- Requiring only new and rebuilt lines to be placed underground is competitively neutral and nondiscriminatory.

II. SECTION 253(c) PROVIDES A SAFE HARBOR EVEN IF THERE WOULD OTHERWISE BE A VIOLATION OF SECTION 253(a).

Section 253 of the Telecommunications Act of 1996 embodies two different and sometimes competing public policies. On the one hand, Congress sought to encourage the entry of multiple, competing telecommunications providers into local markets. On the other hand, it sought to do so without infringing on the traditional rights of state and local governments, particularly in the area of public right of way management. See TCG New York, Inc., et. al. v. City of White Plains, 2000 U.S. Dist. LEXIS 18465 (S.D.N.Y. 2000), at *11-13. The result of Congressional negotiation and compromise is our present day multipart Section 253.

Subsection 253(a) addresses the first of the two public policies described above. It prohibits any state or local requirement that "may prohibit or have the effect of prohibiting" the ability of any provider to enter the local market for telecommunications services. Concerned Municipalities underscore that the standard is stated in terms of a *prohibition*. Mere inconvenience, mere added cost, and even mere delay, by itself, does not meet the relevant standard. The statute states that the

regulation must actually *prohibit* or have the effect of *prohibiting* entry. It must act as an actual or effective *bar* to entry. Any other language only dilutes this intentionally rigorous standard.

But even if a challenger has established that a regulation prohibits or has effect of prohibiting entry, it has not established a basis for a Commission intervention. In enacting Section 253, Congress sought to preserve the historical right of state and local governments to regulate for the public health, safety and welfare. Congress thus created and established two separate safe harbors in Section 253. Subsection 253(b) provides that nothing in Section 253:

> "... shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

In Subsection 253(b), the emphasis is on state regulatory authority. Subsection 253(c) – which is more appropriate to the present analysis – directs its attention to the more particular issue of state and local authority over the management of public rights of way. It provides:

> "Nothing in this Section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

Concerned Municipalities recognize that the Commission's approach (and that of the courts as well) has generally been to consider first, whether there has been a violation of Subsection 253(a) and, if so, to then shift the burden of proof to the governmental entity to establish a safe harbor under Subsection 253(b) or (c). See, e.g., In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, et. al., Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217, Released July 7, 1999, at p. 41, in 185. Indeed, Concerned Municipalities follow

that format in the analysis of parts IV and V below. Nonetheless, it would be equally appropriate, from a logical perspective, to begin the analysis with Subsections 253(b) or (c) because, *if they apply*, there is no need to review the situation under Subsection 253(a). The analysis is moot. If Subsection 253(b) or (c) apply (and the standards are met), Subsection 253(a) is irrelevant.[2]

III. THE COMMISSION HAS NO JURISDICTION OVER MATTERS UNDER SUBSECTION 253(c).

Some of the commentators also seem to reveal a misunderstanding of the jurisdiction of the Commission. Both the express language of the Act, as well as its legislative history, make it clear that the Commission has no jurisdiction over right of way management issues under Subsection 253(c). Those issues are reserved to the local federal district courts.

The Petitions in this matter seek to have the Commission exercise its preemptive powers over certain local ordinances which require undergrounding of cable in certain geographic sections of the communities. In so doing, Petitioner (City Signal) is invoking Subsection 253(d), the section of the Act that accords the Commission its power of preemption. By its express terms, however, that section only permits the Commission to preempt any legislation and requirements "that violates

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[2]Regardless of which approach is taken, it is clear that certain of the Comments, such as those of MFN, are clearly inappropriate. Rather than limit their comments to the facts of this case, they have submitted comments that purport to air grievances and wrongs allegedly experienced at other times and in other places of the country. Such broader comments should have been filed in the Commission's earlier NOI on right of way matters. Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket 96-98, FCC 99-141, adopted June 10, 1999, released July 7, 1999 ("Wireless/Right of Way Order"). To raise these issues now is to give such commentators "two bites of the apple," and impermissibly expand the scope of this proceeding beyond that which was intended.

Subsection (a) or (b)" of Section 253. Subsection 253(d) *conspicuously omits* any reference to Subsection 253(a).

The legislative history to Section 253 makes it clear that this omission was intentional. The original Senate bill conferred comprehensive preemptive powers over prohibitions on entry. The Senate, however, adopted (by vote on floor of the Senate) an amendment sponsored by Senator Gorton (R-Wash) that limited the Commission's preemptive authority, and revised the language of Section 253(d) to read as it presently does. Speaking in support of his amendment, Senator Gorton confirmed that the purpose of the amendment was to ensure preservation of local government control over public rights of way:

> There is no preemption . . . for Subsection (c) which is entitled "Local Government Authority," and which preserves the local governments control over their public rights of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that any challenge to them take place in the Federal District Court in that locality and that the Federal Communications Commission not be able to preempt such actions.

141 Cong. Rec. S. 8213 (Daily Ed. June 13, 1995) (Remarks of Senator Gorton).

It is for this reason that any challenges to local management and regulation of rights of way are to be heard and decided in a local forum and venue, not from a distance in Washington D.C. This was a deliberate policy decision on the part of Congress, as Senator Gorton noted:

> "Once again, the alternative proposal . . . retains not only the right of local communities to deal with the rights of way, but their right to meet any challenge *on home ground in their local district courts*."

Id. at S. 8308 (Daily ed. June 14, 1995) (emphasis added). Congress simply recognized that these types of decisions are quintessentially local in nature. The resulting litigation reflects the wisdom

that each right of way situation involves *uniquely local* circumstances and conditions, and that therefore only local jurisdiction would be appropriate to adjudicate these types of disputes.

In this situation, there can be no doubt but that the regulation City Signal is challenging, i.e., requiring undergrounding of cable in certain parts of the community, and the relief it is requesting, i.e., allowing "aerial" construction of lines in all these cities, involves the exercise of a very basic, fundamental right-of-way prerogative. It involves nothing less than a determination of *where* in the right-of-way a line is to be located. It is difficult to think of any decision more inherent or more essential to right-of-way management. Indeed, the Commission itself has acknowledged this fact, having quoted with approval the portions of the legislative history which expressly include, as one of the examples of permitted right of way management, "[r]equiring a company to place its facilities underground rather than overhead, consistent with the requirements imposed on other utility companies." In re Classic Telephone, Inc., 11 FCC Rcd. 13082 (FCC 1996), at Paragraph 39.

The challenged regulations fall squarely within Subsection 253(c). The Commission consequently has no jurisdiction under Subsection 253(c), and is therefore without authority to grant the preemption requested in the Petitions.

IV. THERE IS NO PROHIBITION ON ENTRY UNDER SECTION 253(a).

A. There is No Prohibition on Entry as a Result of Administrative Delay.

The Petitioner, as well as the number of the commentators, have contended that Section 253(a) is implicated because Petitioner allegedly experienced some delay in the processing of its

application for a permit.[3] After asserting that a specified period of time has elapsed, for which these commentators ascribe blame and liability to the municipalities, the commentators then conclude, ipso facto, that such delays constitute a prohibition on entry. In reaching this conclusion, these commentators neglect to address a number of critical steps in the analysis.

First, in many cases, delays in the processing of applications for permits are self imposed by the applicant. Virtually every municipality can point to situations where applicants may have timely filed their application, but have failed to provide all of the required information or supporting documentation. The courts have held that such things as a description of the proposed geographic area, the proposed construction schedule, a map of the proposed location of the applicant's telecommunications system, and information regarding ownership of the applicant and identification of affiliates, are all appropriate and relevant information necessary to the management of rights of way. See, e.g., TCG New York, Inc. et. al. v. City of White Plains, New York, 2000 U.S. Dist. LEXIS 18465 (December 21, 2000), at *25, citing Bell South v. The City of Coral Springs, 42 F. Supp. 2d. 1304, 1310 (S.D. Fla. 1999). Any allegation of "administrative delay" should only be measured from when *all* required information is supplied. The onus for any incomplete application ought to rest on the telecommunications provider, not on the city.

The Commission should be aware that often what providers claim are "municipal delays" in fact are caused by the providers. For example, some of Concerned Municipalities have had the experience of dealing with a provider who has literally no idea of the geography of the area: The

[3]The allegation of "administrative delay" should be kept distinct from the allegation of a prohibition on entry based solely on the alleged added cost of undergrounding the cable. This Subsection A addresses the former while Subsection B of these Reply Comments below addresses the latter.

provider has the municipality (or streets within it) confused with another municipality hundreds of miles away – and persists in this confusion. The providers in these instances have sometimes complained of delays – yet they are of their own making, as the municipality explains to them, and explains again, that the municipality is not located where they think it is, and that the highways they claim are within the municipality are in fact located hundreds of miles away.

Related problems derive from what may charitably be called "incomplete information" supplied by a provider. One glaring example is a national provider who submitted a purported "application" for a permit to build lines in the rights of way which had to include a map of the streets to be used. The provider's "map" was sketched on the back of a paper restaurant placemat, was not to scale and in several places had "corrections" in the form of yellow sticky notes covering up and changing various parts of the map! Other parts of the application were similarly deficient. The provider had the gall to complain when the municipality threatened to reject the application as administratively incomplete (although it later refiled with a proper application, which was granted)!

Other times the provider has not been available when questions arise or it needs to be contacted. Municipalities have sometimes had the problem of key contact people being absent or otherwise unavailable for one to two weeks.

One frequent cause of the problems (and delays) which providers cause themselves result from their use of national or regional lawyers or consultants to obtain local permits and approvals, even though the lawyer/consultant has little knowledge of the project, geography of the area in question or state or local legal requirements. Examples include:

- Having no idea of municipal boundaries of the area in question, generally or in relation to the project, such that the municipality that is approached for an approval has difficulty determining *whether* a proposed line in fact goes through the municipality. As one example, if a provider wishes to build lines in or near municipal boundaries, a line may be in the municipality if it will be on the north side of a boundary line road, but in a different municipality if it is on the south side. In other instances the provider has either its line (or the municipality) misplaced, such that the proposed line does not appear to go through the municipality, yet the provider still insists on a local permit – at least until the municipality spends significant time doing work the provider should have done to try to get the line correctly located on the map, so all can agree whether or not it passes through the municipality.
- Using unqualified personnel, where often the response to problems such as the preceding is along the lines of "I just work here. I was told to get a permit from a list of municipalities for our line from A to B" even though it is obvious to the municipalities being approached that the list is incorrect.
- Lacking a basic knowledge of state and local legal requirements; for example, not knowing such fundamentals as the fact that, under the laws of a given state, telecommunications franchises are granted by cities (not counties), and that in addition engineering permits have to be obtained from the state highway department for lines to be built on state highways (and from local road commissions for county

roads and from cities for city streets). A minor example of such lack of knowledge of state law is shown by the Comments of Adelphia Business Solutions in this matter where it states that under Michigan law municipalities "are required to grant telecommunications providers permission to construct in the rights-of-way within 90 days of a request."[4] In fact the statute says that a municipality must "approve or deny" an application for a permit in 90 days. MCLA 484.2251(3).

- Where state law allows municipalities to charge providers for both the "fixed and variable" costs of streets the provider uses, arguing that they only have to pay the "incremental" or variable portion of such costs.
- Applying for franchises or permits now, with the intention of "banking" them for future use; i.e., where there is no intent to actually build lines or provide service in the immediate future. In these situations it is often difficult to get the specifics necessary for a municipality to act–for example, what streets will the lines be built on, when will required insurance coverages and bonds be provided, who actually will be building the line, and the like.

Even where there are true delays that are the result of administrative inefficiency, there are often other contemporaneous factors at play which would have delayed the provider's project anyway. If, for example, a provider had failed to complete arrangements for financing, or had perhaps failed to line up necessary subcontractors for the construction, there could be (and often are) situations where the construction project would have been delayed *in any event*, regardless of

[4]Comments of Adelphia Business Solutions, Inc., at p. 6.

whether there was a contemporaneous delay on the part of municipalities. Attempts by providers to put the entire blame on municipalities for administrative delays simply ignore the reality of construction work, and the fact that at any given point in time there could well be a multitude of factors (completely apart from anything a city does or fails to do) which would have the effect of delaying the project. It is simply unfair and unrealistic for providers to "pin" all of the problems and challenges they face on "administrative delay."

In addition, many of the comments of the providers seemed to be operating under the erroneous presumption that *any* processing time at all constitutes "administrative delay." Concerned Municipalities submit that some processing time in reviewing applications is inevitable. Providers have no right to expect or demand immediate turnaround of their applications. The amount of time required will, of course, depend somewhat on the size and complexity of the proposed project, and the degree of anticipated disruption of the public rights of way. The industry commentators make no attempt to factor in such considerations. Rather, they simply assert that a particular period of time elapsed between when they submitted the application and when it was approved, and then immediately jump to the conclusion that it constitutes an "unreasonable" barrier to entry. The impression is that a municipality simply sat on the application. The reality is that (in all probability) the municipality and the provider were in frequent dialog with one another in an attempt to resolve any number of complex issues raised by the project. This is certainly true in the City Signal cases, where much of the so-called "delay" resulted from City Signal's disagreement with the cities' right of way requirements. The fact is that a processing time of several months may well be very appropriate. Indeed, if the speed with which an application is processed is critical to the economical

viability of a project (as some of the commentators have suggested), then it would seem reasonable to inquire as to whether the provider could not have *anticipated* potential delays, and submitted its application earlier in the project cycle. The point is that at least some delay is to be expected, and that in many cases, the alleged adverse effects of delay could have been minimized or avoided with proper planning on the part of the provider.

Speaking generally, there do not appear to be significant problems regarding local approvals for telecommunications facilities. This is shown by a simple comparison of the minuscule number of complaints and lawsuits by providers regarding such matters when compared to the hundreds of millions of miles of new telecommunications lines that have been installed by thousands of providers in tens of thousands of municipalities nationwide in recent years.[5] Nor does "delay" appear to have been the real issue in the City Signal cases. Were that the real problem, City Signal would have requested an order from the Commission directing the cities to complete their review process within a specified period of time. But that is not the relief which City Signal seeks. Instead, it is requested that the Commission issue an order permitting City Signal to install aerial lines, without any reference to a need for removal of administrative bottlenecks.

Concerned Municipalities submit that the real reason the providers have alleged "unreasonable delays" has nothing to do with a prohibition on entry. Rather, it is a thinly disguised attempt to convert a Section 253(c) safe harbor into a Section 253(b) matter, so as to invoke a Commission jurisdiction. As previously indicated, the Commission has no jurisdiction over Section 253(c) matters. Nevertheless, the providers calculate that if they can convince this Commission that

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[5]By way of example, there are over 30,000 local units of government nationwide.

there are substantial administrative delays, and that the reason for such delays are other than legitimate right of way matters, they can convince this Commission to exercise jurisdiction where it would otherwise be clearly inappropriate. The Commission should not fall for this trap. To do so would completely denude Section 253(c) of any efficacy, as providers could with relative impunity always allege some element of ostensible "delay" and force municipalities to defend their ordinances and regulations before the Commission, rather than the local federal district courts, as Congress had intended. If Subsection 253(c) is to have any integrity at all, the Commission must guard against attempts by providers to transform a dispute into a Subsection 253(b) matter simply by masquerading under the all too convenient rubric of "unreasonable delay."

One other matter involving the issue of "delay" bears brief mention. The Commission should be aware that there are a number of "rogue providers" who, often on the advice of overly aggressive lawyers, know little and care less about state and local laws regarding lines in rights of way.[6] It is often these providers who cause the types of problems and delays described above, resulting in justifiable concerns at the local level and a movement to adopt local right of way laws or ordinances so that consequent problems are addressed. Such ordinances will apply to multiple providers, so they can be time consuming to prepare, particularly because providers often make the contradictory argument that the ordinance should both (1) be identical for all providers (level playing field), but

[6]It is often the same lawyers and providers who, like MFN in this proceeding, argue for the Federalization of all right of way matters–they want this Commission to be the Federal Franchising Authority and Federal Right of Way Management Authority on telecommunications matters for all state and local highways nationwide. As shown in the initial Comments of Concerned Communities in this proceeding, and infra, such Federalization of local right of way management matters is not permitted under our Constitution and has been statutorily denied this Commission under Section 253 of the Communications Act.

(2) be flexible (such that providers can be excused from provisions which they contend should not apply to them).

Just as it is the bad apples who often lead to codes and requirements being imposed where previously there were none (think of "slamming" as an example), it is in part the actions of such rogue providers who complicate matters for all providers – their actions are part of the reason more municipalities are adopting right of way ordinances applicable to all providers, often with attendant delays while such ordinances are being adopted.

B. <u>There is No Prohibition to Entry Based on the Relative Costs of Undergrounding and Aerial.</u>

The general comments filed by various providers on the cost of undergrounding are misleading, but in any event not relevant to these matters, which relate to the specific situation of City Signal in the five locations in Cleveland Heights, and similar locations in Wickliffe and Pepper Pike.

The comments are misleading for the five reasons set forth next--(1) they understate the cost of aerial construction, (2) overstate the cost of undergrounding, (3) ignore low-cost undergrounding alternatives, (4) ignore cost savings from undergrounding, and (5) ignore the far greater bandwidth of the new providers' fiber lines compared to the copper lines of the incumbent.

First, as was pointed out in Concerned Municipalities' January 29 Comments in this matter, aerial construction is not always easy or inexpensive, as industry commentators suggest. New providers wishing to place their lines on poles are typically required to pay for the "make ready" work necessary to make the poles ready to accommodate the installation of new lines. The amount of "make ready" work depends on such factors as the specific poles in question, their height, age,

condition, available free space, appliances placed on the poles by other providers, necessary guying, separation requirements, code requirements and engineering standards. The cost of make ready work can vary from very little (for a pole which can readily accommodate a new line) to the increasingly more frequent situation where there is insufficient space on the pole in question for a new line and the utility company has to install a new, taller pole, after which all existing providers have to switch their lines and equipment to the new pole. The old pole is then removed. It can easily cost many thousands of dollar *per pole* to make such a change. And often all the poles on the street must be replaced.

Such requirements to "change out" a shorter pole for a taller one are increasingly frequent as more and more lines are placed on poles and available space is "maxed out." They are particularly frequent at intersections where an array of north-south utility lines encounters and crosses a comparable array of east-west lines, with the result that much more (roughly double) the usable space is required on the poles located at the intersection, hence increasing the likelihood that poles will have to be replaced to accommodate a new provider. And costs increase significantly to the extent that there are street lights, utility transformers, cable television power supplies, fiber optic notes or other equipment (other than just lines) attached to the poles in question. As a result, industry officials tell municipalities that the cost of new aerial lines is often in the range of $20,000 to $30,000 per mile–in any event far more than the figures thrown out by industry in this proceeding.

Second (and third), the industry comments vastly overstate the cost of placing lines underground, in part because they ignore low-cost alternatives. In particular, they ignore the well

known practice of "plowing" lines underground, which is routinely used for electric and communications lines, and which is inexpensive.

They similarly ignore the new practice in urban areas of placing fiber lines in public sewers.[7] As is apparent, sewers (storm and sanitary) are present in virtually all urban areas where there are telecommunications customers, and are often available at low cost. Between plowing and sewers, there are relatively inexpensive means for undergrounding available in both central business district and more residential settings. Partially as a result, industry officials quote cost ranges for undergrounding to municipalities that often overlap those of aerial construction, that is, the lower range of undergrounding costs overlap the high end of aerial construction costs. Thus if the higher end of aerial costs are in the order of $25,000 to $30,000 per mile, the low end of undergrounding costs starts in the low to mid $20,000 per mile.

Fourth, industry commenters totally ignore the much lower *life cycle* costs of underground construction. Specifically, as the City of Richmond, Virginia pointed out in its comments, underground lines are *not* subject to the ravages of weather, winter storms, lightning, falling trees, over height trucks, fire and automobiles bringing down utility poles to which aerial lines are continually exposed.[8] To provide a few examples, winds and ice routinely destroy aerial lines. For example, in northern Vermont in 1999 an ice storm destroyed literally every utility pole in a several

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[7]See, e.g.--Amy Larsen DeCarlo, *This Fiber Optic Plan's All Wet -- Sewers Are Tapped for Network Rollout*, Tele.com, February 5, 2001; Tim Lemke, *Washington D.C., Considers Robot Cable Runners*, The Washington Times, February 7, 2001; Victor Epstein, *Omaha, Neb. To give Maryland Firms Sewer Robot a Chance to Lay Fiber Optics*, Omaha World, October 17, 2000; *Robot Lays Fibre-Optic Cable in Sewer Systems*, Tele-Service News, January 2001.

[8]City of Richmond Comments, pp. 4-5.

county area. Similarly, hurricanes, tornados and strong winds in coastal, central and southern U.S. each year destroy tens of thousands of miles of aerial lines. In each case, underground lines are largely unaffected.

Throughout the U.S. cars and trucks routinely down utility lines – either by hitting the pole or by snagging the high-strength steel carrier or guy wire attached to the pole. Such carrier and guy wires are required to have a tensile strength of at least 6,000 to 9,000 pounds, with the result that utility poles snap like matchsticks when a car or truck snags the wire.

And lightning strikes all of the U.S. When it travels down the steel carrier wire to which the fiber wire is lashed, it can easily melt or harm the non-conductive fiber line.

By contrast, underground lines are relatively immune from the preceding types of problems – which as a matter of business strategy and marketing telecommunications providers use as selling points to customers along the lines of "Our lines are underground and thus more reliable than the aerial lines of your current provider."

Thus if there is a cost comparison to be made, it must be of the *life-cycle* cost of the specific aerial versus underground line in question, not just the first cost. If first cost were all that mattered, fiber lines would have paper maché around them and flimsy paper sheaths, not the expensive plastic coatings and sheaths they in fact have. Life cycle cost would take into account the shorter expected useful life of aerial lines and their higher maintenance and repair costs. Such life cycle costs vary with the municipality in question – particularly on such items as the nature, frequency and severity

of the destructive weather conditions described above, whether there are trees adjacent to the right of way[9] and the frequency with which utility poles suffer damage from automobiles.[10]

Fifth, a cost comparison of the incumbent's aerial copper lines versus the cost of a new provider's underground fiber line has to take into account the vast difference in bandwidth or carrying capacity between the two. As is well known, a single fiber strand can easily carry thousands or millions of times as much data as twisted pair copper, can carry it miles further without reamplification and can carry it without the distortion inherent in copper or other electromagnetic based forms of transmission. Comparing nominal dollar costs for lines without taking such differences in performance into account is like suggesting that a 1988 Apple IIe computer is a better value than a 2001 Pentium III model (or that a 1949 Philco 9" black and white TV is a better value than a new HDTV set) – without noting the vast differences in performance between the two. If cost without performance was the criteria, airplanes would still be fabric covered biplanes!

For the preceding reasons the general comments filed by industry providers on the cost of aerial versus underground construction are misleading and must be disregarded.

More important, the "general comments" of industry providers are just that – general comments – and do not address the specific lines and costs at issue in this case. As Concerned

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[9]Such trees or tree limbs can fall and take out lines or rub against them and cause damage. For example, trees are less common in the West, Southwest and Great Plains than in the Northeast and Mid-Atlantic states.

[10]Such accidents can vary significantly, depending on such matters as the nature of the street in question (artery, residential), overall traffic accident frequency, street width, the presence and frequency of on-street parking (parked cars tend to protect utility poles from traffic) and how far utility poles are set back from the traveled portion of the right of way.

Municipalities showed by the preceding passage and in their initial Comments, whether City Signal faces any increase in initial installation cost, its amount, the availability of less-costly alternatives (such as routing lines around the five specific areas in Cleveland Heights where the City desires undergrounding) is highly fact specific. These are facts which have not been provided – not even a map of the area or a statement of how many feet or miles of line are potentially involved.

Whether any increase in costs acts as a "prohibition on entry" to City Signal is equally fact specific – it is dependent in part on City Signal's overall economics and business plan. For example, undergrounding 100 yards of a 100 mile system is not a prohibition on entry. City Signal has provided no information on these points. And as the City of Cleveland Heights pointed out in its comments, one new provider has been able to place its lines underground in the areas in question. So the City's undergrounding policy by definition is *not* a "prohibition on entry" by new telecommunications providers.

C. City Signal's Agreement to Place Its Lines Underground In Other Locations Belies Its Contention That Such a Requirement Is An Effective Prohibition To Entry.

All of the foregoing analysis is unnecessary, of course, if City Signal has – as an empirical, factual matter – actually placed some of its lines underground (or agreed to do so). If City Signal has placed some of its lines underground, then it has demonstrated that the cost is evidently not prohibitive, i.e., the project apparently remains economically viable even with the undergrounding requirement. Even evidence of a provider's *agreement* (during the course of its negotiations with the municipality) to comply with the municipality's requirements is sufficient to demonstrate the absence of any real barrier to entry. Several recent court cases under Section 253 have expressly rejected claims of a "prohibition on entry" or the like in part based on evidence that the provider had

agreed to the restriction being challenged. See, e.g., City of Dearborn, supra, 16 F. Supp 2d. at 790-791; City of White Plains, supra, 2000 U.S. Dist. LEXIS at *47-48.

City Signal states in its Petitions in these cases that it is building an extensive fiber optic network throughout "various municipalities in Northeast Ohio."[11] As set forth on the map of Northeast Ohio attached to Concerned Municipalities' initial Comments in this matter, that territory extends (roughly) 100 miles east to west and a comparable distance north to south. It encompasses all of the Cleveland, Akron and Youngstown Metropolitan Areas which have a combined population of approximately 3.5 million. It is a certainty that City Signal has agreed to place its lines underground at various places in this large area.

A key factual point are the circumstances and terms and conditions on which City Signal has agreed to place its lines elsewhere. Concerned Municipalities believe that it is likely that, much as in the White Plains and Dearborn cases, City Signal's other undergrounding arrangements will give the lie to its "effectively prohibit service" claim under Section 253, or to other material points of its case under Section 253. Undergrounding is not a "prohibition on entry" if elsewhere City Signal has voluntarily agreed to place its lines underground. Unfortunately, the extent to which City Signal has done so is likely to remain unclear without further discovery. As a result, it may be desirable, if not necessary, to undertake a contested case hearing in order to consider and resolve these factual issues.

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[11] See, e.g. Cleveland Heights' Petition, at Paragraph 2.

V. COMPETITIVE NEUTRALITY AND NONDISCRIMINATION

A. The Competitive Neutrality Rules Allow for A Reasonable Distinction Under these Circumstances.

Subsection (c) provides that nothing in Section 253 shall effect "the authority of a State or local government to manage the public rights of way," provided such management is done on a "competitively neutral and nondiscriminatory basis . . . ." Some commentators have asserted that this latter clause requires municipalities to guarantee a "level playing field" such that no distinctions at all can be made between classes of providers.

Such Comments are in error. A whole series of recent court decisions have made it unequivocally clear that this is not the statutory standard, and is not the meaning of "competitive neutrality." In City of White Plains, supra, for example, TCG New York had challenged the City of White Plains franchise ordinance on the grounds that similar franchise requirements were not made of the incumbent provider, Bell Atlantic. TCG contended that this disparity violated Section 253(c). The court, however, expressly rejected that contention, stating that "the City need not treat Bell Atlantic and TCG identically in order to satisfy Section 253(c)." 2000 U.S. Dist. LEXIS 18465, at *50. The White Plains court went on to note that Congress had considered, but then explicitly rejected, a proposed "parity" provision which would have prohibited distinctions between providers. Id. at *51 (referencing 141 Cong. Rec. H8427) (August 4, 1995). See also AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d. 582, 594 (N.D. Tex 1998) (discussing the so-called Stupak Amendment, and affirming that the amendment clearly reflects Congress' rejection of the "parity" concept). Even though the White Plains franchise would impose disparate fees on TCG than on Bell Atlantic, the court was unwilling to find the franchise to be noncompetitive or

discriminatory, particularly when it considered that Bell Atlantic had provided other benefits "compensation in kind" to the City in previous years. Id. at *54-55. The court then concluded:

> The Court finds this evidence is sufficient to sustain the City's burden that the fees charged to TCG and the fees paid by Bell Atlantic are competitively neutral and nondiscriminatory. TCG offers no proof that the fee "charged" to Bell Atlantic, as opposed to that which would be imposed on TCG, would have a noncompetitive or discriminatory effect. Simply asserting that the fees being charged were "different" or "unequal" is an insufficient demonstration that they are noncompetitive or discriminatory in violation of § 253(c). See City of Dearborn, 16 F. 2d. at 792 ("Nothing in the debate of the Stupak-Barton amendment, which became Section 253(c), indicates that it was intended to force local authorities to charge exactly the same fees and rates, and, in fact, it explicitly rejects that proposition."); City of Dearborn, 16 F. Supp. 2d. At 792 ("competitively neutral" and "nondiscriminatory" is not the same as being identical) (citing 141 Cong. Rec. H8427).

Id. at *55-56 (emphasis added).

A similar conclusion was reached in TCG Detroit v. City of Dearborn, 16 F. Supp. 2d. 785 (E.D. Mich. 1998). TCG there contended, among other things, that Dearborn's intention not to impose on Ameritech (the incumbent provider) the same franchise obligations as it sought to impose on TCG constituted impermissible discrimination. As in White Plains, the court rejected that argument, concluding:

> "TCG goes too far by equating the City's answer that the requirements will not be identical with a contention that it is unequal or discriminatory. TCG presents no evidence to the Court that the City must impose exactly the same agreement on each telecommunications provider without consideration of each provider's size, contemplated use of the right of way, space available and the like. Moreover, the explicit language of the statute does not require such strict equality. All that is required is that the compensation sought be nondiscriminatory and competitively neutral." 47 U.S.C. § 253(c).

16 F. Supp. 2d. at 792 (emphasis added).

The issue of distinctions between an incumbent provider and a new provider was raised even more recently in Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, et. al., 38 F. Supp. 2d. 46 (D. Mass. 1999), aff'd, 184 F. 3d. 88 (1st Cir. 1999). The court there upheld the right of the city to distinguish between an incumbent provider, which already had conduit and was merely converting it to new uses, and a new provider that sought to install new and additional conduit. As the court put it:

> Constructing new conduit requires digging up the City streets and attendant disruption. Putting new cable in existing conduit or converting existing cable to new uses does not require digging up streets or disruption. Thus, it is not discrimination for the City to have different policies for the construction of conduit that is new and for the conversion of the uses to which existing conduit can be put.

184 F. 3d. at 103 (emphasis added).

The law clearly recognizes the right of municipalities to make reasonable distinctions between providers – including distinctions between incumbent providers and new providers – where the circumstances warrant.

B. Requiring New and Rebuilt Lines to Go Underground is Reasonable.

Requiring new and rebuilt lines to be placed underground makes sense both because it addresses serious health and safety problems, and because it lowers the cost of undergrounding. The Cities' requirement is also competitively neutral and non-discriminatory. In fact, it is the new providers who believe they would get a competitive *advantage* by requiring the incumbent to place a much greater length of lines (than the CLECs currently propose to build) underground, having the incumbent incur this large cost now (thus giving the CLECs a cost advantage) and then allowing the CLECs to use the extra space in the newly constructed conduit at a favorable rate.

At the outset, it should be noted that municipalities–or any government agency–commonly state that a certain amount of an item is acceptable, but that increases will be harmful. Preventative or ameliorative measures will thus apply only to *increases*.

Examples occur in municipal zoning. When an area is zoned or rezoned, often there are uses that do not conform to the new zoning requirements. Such "non-conforming uses" are grandfathered. Over time, they come into compliance with the zoning requirements as the uses of grandfathered properties change and buildings area built and replaced.

The same is true with respect to many of the Commission's rules. Often new requirements apply only to items built or actions taken after a certain date. In these cases there is no immediate requirement to go back and bring existing installations into compliance with the new requirements, although this will occur naturally over time.

Here, the Cities have made a determination that additional lines would be harmful to the Cities, their residents and the public interest. Most municipalities are aware of the extreme example of excessive overhead lines reflected in graphic pictures of overhead lines on the streets of New York City a century ago. There were literally hundreds of lines in the air. To accommodate them utility poles were unusually tall, with multiple crossbucks/crossarms on them to provide attachment points for the large number of wires. And this large number of lines not only ran up and down, longitudinally along the streets, but for each wire there were multiple "drops" or lateral connections running across the street to the customer being served. Large buildings with many customers led to large numbers of such lateral lines.

Such large numbers of lines are not only aesthetically objectionable, they are also harmful to residents businesses and business development. As indicated in prior portions of these Reply Comments, overhead lines – especially the increasing number of overhead lines being proposed these days as telecommunications, school system distant learning networks, cable systems and other lines expand – pose very real problems and safety hazards. For example, the more lines, the lower they are on the pole, and the greater the risk that the line will sag too low[12] and be snagged by a passing truck, snapping the pole and dropping it and live wires into the streets. Falling poles, falling wires and live wires in the streets and sidewalks can be serious safety hazards. It is for this reason that utility lines area have been placed underground in most central business districts as well as in most residential developments built in recent decades.

And fallen lines disrupt both communications and business. Stated otherwise, underground lines are more reliable than aerial lines, and are perceived as such by residents and businesses. It is thus appropriate for municipalities, as a part of their progressive management of the public rights of way, as well as to protect the public safety and welfare, to require that lines be placed underground. Here, Cleveland Heights has indicated that its requirements are part of an overall effort by a city built in the first half of the 20th Century to prevent the deterioration of its older business areas and assure that they remain vital in the face of competition from the new suburban business areas built in the late 20th and early 21st Century.

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12 Lines running across a street can sag too low for a variety of reasons, including improper installation, ice accumulations, drops or guy wires on the opposite side of the pole from the street giving way (such that the pole tilts towards the street, lowering the lines crossing the street) and so on.

The comments of the new providers state that the *only* way to go about this is for cities to require *all* lines in affected areas to be placed underground at the same time. In effect, the new providers want a "one size fits all" Federal policy on utility line undergrounding, applicable from Maine to California and Guam, and from the State of Washington to Florida and Puerto Rico, and encompassing *all* lines that may be in the air – electric, cable, telephone and other. The Commission must resist such "Federalization" because the progressive approach taken by the three Cities not only makes sense, it is competitively neutral and non-discriminatory and thus within the safe harbor of Section 253 (c) of the Act.

The question the three Cities faced was how to address undergrounding. In some situations–such as where a downtown business district is being extensively rehabilitated, or where utility lines will have to be replaced (such as due to a thoroughfare is being widened) – it may make sense to have all utility lines placed underground at the same time. Where it is appropriate, this occurs.

In some situations, however, it is not appropriate. There are good reasons why a City may require (in essence) that only new or rebuilt lines in a certain area be placed underground. These reasons include the following:

First, it costs less. It costs less because it is less expensive to wait until a line is going to be rebuilt and only *then* require that it be placed underground, as compared to requiring old lines to be placed underground now and then later incur the additional expense of replacing the old lines with new lines. Reducing the cost of compliance is an obvious public welfare benefit. Indeed, as the industry commenters acknowledge, the incumbent providers are facing a massive rebuild as they

scramble to replace their antiquated copper lines with fiber. See, e.g., Comments of Adelphia at p. 26, n. 34. It is thus only a question of time before construction by the incumbent alone will result in the undergrounding of its lines in the areas in question.

Second, requiring only new and rebuilt lines to be put underground defers the expense involved. The cities are thus not being spendthrifts with the telecommunications providers' money, but are allowing the providers to delay the cost of undergrounding and spread it out over some years.

Third, requiring only new and rebuilt lines to be put underground *lets market forces operate*: The lines that get placed underground first are those that have the highest return (e.g–reach the largest number of customers), are least expensive to place underground, or both.[13]

Fourth, preventing the construction of additional lines which would make the problem worse only makes sense.[14] At the same time, municipalities, like this Commission, are sensitive to the costs that of new regulation – here the cost of undergrounding – and recognize that a plausible case can be made that if the municipality, its residents and businesses have lived with the existing lines for many years, that they live with them for a few more years until a rebuild or upgrade occurs–as long as new aerial lines aren't being built to make matters worse.

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[13]However, the new telecommunications providers prefer regulation to market forces because (as discussed below) they believe regulation gives them a competitive advantage.

[14]Contrary to the suggestion of the providers, each additional wire has an impact. And if a municipality lets one more wire be built overhead, how can it then keep out the next, and the next, and the next? Each new provider argues that the incremental impact of its line is nil. If accepted, this argument leads directly to no change from the current situation – and an increase in the problem trying to be addressed and corrected.

Municipalities thus can legitimately determine that appropriate management of their rights of way in some instances require lines to be placed underground *progressively*, over a period of years, as current lines are replaced and new lines are built. As is apparent from the preceding, such a policy is competitively neutral and non-discriminatory. It is a distinction based on the *time of rebuilding or construction*, regardless of who does it. It is also a distinction which of necessity will impose large burdens on the incumbent provider, whose lines are seemingly ubiquitous. The incumbents have to build or replace millions of miles of existing lines both to replace deteriorating and obsolete plant, to add new capacity, and to install new fiber plant to compete with the new providers. It is simply market forces and specifics of what lines need replacing (or an upgrade in capacity) which determine which lines the incumbent will have to build/rebuild, and hence place underground.

Thus, although the incumbent provider may not be having to place its lines underground in the five areas of Cleveland Heights *today*, it may well be placing lines underground elsewhere in the City. Stated more generally, the appropriate comparison (at a minimum) has to be city-wide, and cover a several-year time-span, *viz*–the policy must consider the lines the incumbent has placed underground in the City over a several-year time span as compared to those placed underground by the new provider.

In fact, Concerned Municipalities believe that the new providers are pushing for a policy requiring all lines to be placed underground specifically because they think this will give them a competitive advantage: Require the incumbent, who has lines everywhere, to incur the substantial cost of putting existing lines underground. The new providers don't have this expense (or much of

it), so forcing the incumbent to incur large costs is to their advantage. It is doubly to the new provider's advantage if (as municipal or other policies often require) the incumbent installs extra conduit, which the new providers can then use at a fraction of the cost incurred by the incumbent.

VI. CONCLUSION

For the reasons set forth above, the three Petitions for Declaratory Ruling in CS Dockets 00-253, 00-254 and 00-255 should be dismissed without further action by the Commission.

February 14, 2001

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CERTIFICATE OF SERVICE

I, Robert Allen, hereby certify that on this 14th day of February, 2001, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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